ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	)	
	)	
Amendment of Rules and	)	
Policies Governing Pole	)	CS Docket No. 97-98
Attachments	)	
	)	
	)	

REPLY COMMENTS OF THE UNITED STATES TELEPHONE ASSOCIATION

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SUMMARY

Comments filed by other parties in this proceeding reveal a number of incorrect statements and general misconceptions regarding poles and conduits and the accounting system used to track and allocate their costs. The argument that a pole-owner is compensated for under-recovery in the later phase of a pole by over-recovery in the early phase is incorrect. Full cost recovery does not occur until both the original investment and the disposal costs are recovered. Nor is there any over-recovery through "double-charging." Non-recurring charges cover the expenses of specific one-time activities that are not included in the investment accounts. Because these one-time activities are not included in the investment accounts, "double charging" through the pole attachment formula does not occur. Also, the Commission has already rejected arguments that ILECs "double charge" by leasing out pole space resulting from an attacher-initiated modification that resulted in increased capacity. The Commission has put the burden of recovering investment costs from subsequent attachers squarely on the pre-existing attacher, not the pole-owner.

The Commission should reject suggestions to adopt TELRIC as an appropriate forward-looking cost methodology. TELRIC is necessarily based on hypothetical networks, whereas the statutory language of Section 224 requires that the formula be based on operating expenses and actual capital costs. As such, TELRIC is incompatible with the statutory requirement.

The Commission's proposed gross book methodology should be adopted. Arguments that the proposal should be rejected because it would not result in any additional administrative efficiencies miss the intent of Section 224, which is to balance efficiency with accuracy. To the contrary, results using the proposed gross book method would be *more* accurate *without* entailing any additional complexity or administrative inefficiencies.

The Commission should reject arguments that ILECs are attempting to inflate their costs artificially. The statement that ILECs have inflated disposal costs to finance new ventures is reckless and denigrates the competence of all parties involved in the depreciation rate prescription process. Furthermore, the Part 32 accounts identified by the Commission are appropriate and fairly capture the costs associated with owning and maintaining pole networks. There is no overlap between the accounts identified by the Commission. Accordingly, the Commission should adopt its proposed Part 32 mapping without major modification.

Section 224 refers to "occupied space" for allocating the costs of pole ownership. The Commission should reject arguments stating that pole load capacity is the proper factor for allocating the costs. However, the occupied space is not a "free zone" into which an attacher can place as many, or any manner of, attachments as it sees fit. Such an argument rests on the notion that an attacher accrues ownership rights by virtue of its attachment. This notion is incorrect and has already been rejected by the Commission. The proliferation of "free zones" would allow parties to engage in third-party subleasing and would endanger the physical integrity of pole networks.

The Commission should forbear from applying the pole attachment complaint process to wireless attachments. Unlike wireline plant, wireless attachments are not limited by the number of attachment mediums. Applying Section 224, which is premised on the existence of bottleneck facilities, would result in wireless attachment rates bearing no resemblance to those negotiated in the marketplace.

The Commission should adopt its half-duct occupancy presumption. Parties arguing to the contrary ignore the practical difficulties and inadvisability of installing inner-ducting after a

duct is already occupied. Moreover, while modern ducts that are empty may be able to accommodate more than two inner-ducts, older ducts are generally smaller than modern ducts and are unable to accommodate more than two inner-ducts, even if they are unoccupied. The Commission's proposal is a reasonable compromise and should be adopted.

Comments urging the adoption of "most favored nation" and rate publishing requirements should be rejected. They are beyond the scope of this proceeding and would irretrievably undermine the framework of negotiation which Congress and the Commission encourage in the pole attachment process. The danger such requirements pose to the concept of free negotiations has been recognized by the judiciary in the separate Interconnection proceeding.

The Commission should reject arguments to grant a blanket exemption from the "essential facilities" doctrine for electric utility poles. The electric utilities fatally misconstrue the "essential facilities" doctrine throughout their argument and misrepresent their competitive interests. Moreover, in addition to being fatally flawed, the argument is, in the final analysis, circular.

In light of the electric utilities attempt to wriggle free from their obligations under the "essential facilities" doctrine, USTA again urges the Commission to act within its discretion and extend the pole attachment complaint process to agreements between ILECs and utilities. Failure to do so will preclude a level competitive playing field between ILECs and utilities as more and more utilities begin providing competitive telecommunications service, either through their "exempt telecommunications company" status or in conjunction with established competitive telecommunications service providers.

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The United States Telephone Association ("USTA") respectfully submits these comments in reply to those filed previously by other parties in the above-referenced docket in which the Commission inquires as to what adjustments should be made to the rules and policies governing pole attachments.[1]

I. Accounting And Cost Recovery Issues

A. The Argument That Cost Under-Recovery During The Later Phase Of A Pole Is Offset By Cost Over-Recovery During The Early Phase Is Incorrect.

In its Notice, the Commission correctly acknowledges that "the inclusion of the disposal cost in depreciation could have the tendency to render pole attachment rates inordinately low."[2]

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[1] In the Matter of Amendment of Rules and Policies Governing Pole Attachments, Notice of Proposed Rulemaking, CS Docket 97-98, FCC 97-94 (released March 14, 1997). ("Notice").

[2] Notice at ¶ 25. See, also, Notice at ¶ 23, footnote 59.

However, the Commission then proceeds to surmise incorrectly that this under-recovery is "balanced by over recovery in the early phase of the pole's life," when a new pole is expected to require less maintenance.[3] This erroneous line of reasoning is echoed by AT&T in this proceeding.[4]

As a preliminary matter, this argument assumes that all pole maintenance costs are directly related to the age of the pole. This is, in fact, not the case as any pole-owner whose service area has recently suffered from a snowstorm or a hurricane can attest. Even less severe but more common weather phenomenon cause damage to poles that require maintenance. However, the primary reason that there is no balancing between over-recovery and under-recovery is because full recovery of costs does not occur until both the original investment and the disposal costs have been recovered. Because future net salvage is included in the accumulated depreciation reserve, a percentage of that reserve is always devoted to the recovery of disposal costs. That is why the statement that the original investment costs are fully recovered when the pole account becomes negative is incorrect. The "balancing" argument is more accurately described as a matter of varying degrees of cost *under*-recovery. The Commission should recognize that there is no balancing of over-recovery with under-recovery.

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[3] Notice at ¶ 25.

[4] Comments of AT&T at p. 15 (filed June 27, 1997).

B. Make-Ready Charges Are Non-Recurring Charges Not Included In Pole And Conduit Investment, And Thus Do Not Constitute "Double Charging."

The administrative and maintenance carrying charge components represent annual, recurring costs. When an ILEC assesses a non-recurring charge on an attacher, the expense of the activity in question is fully recovered and booked separately from the pole and conduit accounts. Such charges do not increase an ILEC's pole or conduit investment, so there is no redundant recovery through the pole attachment rate. Make-ready and other non-recurring charges recover specific and unique pole-related costs that are not part of the general accounts tracking the mundane, everyday costs of poles and conduit. These non-recurring charges are not booked into the accounts used to determine attachments rates, hence there is no double-charging.

C. Arguments That Pole-Owners Should Provide Attachers An Offset For Future Revenue Derived From Attacher-Initiated Modifications That Resulted In Additional Capacity Have Already Been Rejected By The Commission.

MCI makes the argument that the Commission should prohibit a pole-owner from recovering through means of non-recurring charges its attacher-initiated investment costs that result in added attachment capacity.[5] MCI concedes that "rearrangement expenses associated with investments that add capacity are legitimately recovered through make-ready charges... However, the asset value of these investments should not be included in the make-ready costs."[6] MCI argues that the pole-owner may rent the additional unused capacity, and that by including

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[5] Comments of MCI at p. 6-7 (filed June 27, 1997).

[6] Comments of MCI at p. 6, footnote 9 (filed June 27, 1997).

the investment cost in a non-recurring charge, the pole-owner recovers its investment costs twice. MCI is wrong. The Commission has already decided this issue. In the Interconnection Order the Commission stated:

> We recognize that in some cases a facility modification will create excess capacity that eventually becomes a source of revenue for the facility owner, even though the owner did not share in the costs of the modification. We do not believe that this requires the owner to use those revenues to compensate the parties that did pay for the modification. Section 224(h) limits responsibility for modification costs to any party that 'adds to or modifies its existing attachment after receiving notice' of a proposed modification. The statute does not give that party any interest in the pole or conduit other than access. Creating a right for that party to share in future revenues from the modification would be tantamount to bestowing an interest that the statute withholds. Requiring an owner to offset modification costs by the amount of future revenues emanating from the modification expands the category of responsible parties based on factors that Congress did not identify as relevant. Since Congress did not provide for an offset, we will not impose it ourselves. Indeed, a requirement that utilities pass additional attachment fees back to parties with preexisting attachments may be a disincentive to add new competitors to modified facilities, in direct contravention of the general intent of Congress.[7]

MCI's proposal to reduce the pole-owner's "net investment in poles and conduit by the amount of investment undertaken at the request of a new attachee," amounts to just such an offset.[8] If MCI is concerned about recovering its costs for a modification it initiated that resulted in additional capacity used by subsequent attachers, then it must avail itself of the cost recovery option

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[7] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket No. 96-98, FCC 96-325 (released August 8, 1996) ("Interconnection Order") at ¶ 1216.

[8] Comments of MCI at p. 7 (filed June 27, 1997).

afforded it by the Commission in the Interconnection Order.[9]

D. Suggestions That The Commission Should Adopt A Forward-Looking Cost Methodology Based Upon Or Similar To The TELRIC Methodology Should Be Rejected.

As a preliminary matter, the pole attachment formula establishes a pole attachment rate floor whereby the floor is determined by setting the rate equal to the incremental costs of the pole owner. Since TELRIC is a cost methodology based on incremental, albeit hypothetical, costs, to a certain degree urging the Commission to adopt TELRIC with respect to pole attachment rates is redundant and superfluous. Urging its adoption provides no substantive input to the Commission in this proceeding.

From a practical standpoint, TELRIC is inappropriate as a forward-looking cost methodology for setting the upper limit of pole rates as the comments of some parties suggest.[10] The Commission's pole attachment complaint process[11] is predicated on reference to the

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[9] Interconnection Order, at ¶ 1214. ("To protect the initiators of modifications from absorbing costs that should be shared by others, we will allow the modifying party or parties to recover a proportionate share of the modification costs from parties that later are able to obtain access as a result of the modification.") The responsibility for recovering such modification costs from subsequent attachers lies with the attacher initiating the modification, not the pole-owner.

[10] Comments of Sprint at p. 6, and AT&T at p. 21 (both filed June 27, 1997). AT&T cites a cost-of-capital analysis performed by Dr. Bradford Cornell. Dr. Cornell's analysis relied on a five-year period of historical data to estimate the forward-looking cost of capital. The results of his analysis significantly underestimate the future risk of capital for ILECs that has resulted from passage of the Telecommunications Act of 1996. Moreover, the analysis relied on a discounted cash flow model containing an inherent downward bias.

[11] 47 C.F.R. Subpart J, §§ 1.1401-1.1415.

Commission's Part 32 Uniform System of Accounts. Indeed, a significant portion of the Commission's Notice is dedicated to identifying and codifying the appropriate accounts to utilize in the Commission's complaint process. Furthermore, by statutory definition, the upper limit of pole rates determined by the pole attachment complaint process is based on the "operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit or right-of-way."[12] TELRIC necessarily presumes a hypothetical and perfectly efficient network,[13] a concept that is irreconcilable with "operating expenses and actual capital costs."

TELRIC is a cost-setting methodology. Congress has already provided the Commission with a cost-setting methodology in the statute. Adopting TELRIC -- a cost methodology based on imaginary ideals -- as a forward-looking cost methodology directly contravenes the statute and the Commission should reject it for that reason.

E. The Argument That The Commission's Proposed Gross Book Cost Methodology Would Not Be More Administratively Expedient Avoids The Issue Of Balancing Expediency With Accuracy.

NCTA argues that the Commission's proposed gross book cost methodology would not save any steps and that "administrative expediency favors performing the entire calculation on a net basis..., and there are no regulatory or administrative efficiencies to be gained by moving to

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[12] 47 U.S.C. § 224(d)(1).

[13] Interconnection Order, at ¶¶ 684-685.

all-gross calculations."[14] This misses the point of Section 224 entirely.[15] Administrative efficiency is a goal; it is not the goal. NCTA's argument might have some merit if the gross book figures were not readily available or if use of these figures entailed lengthy additional steps in determining the carrying charge components. As USTA stated in its initial comments, gross book figures are publicly available in the annual ARMIS filing requirements.[16] Use of these figures would not entail any additional steps beyond those necessary to alter the pole attachment formula to conform with the Commission's gross book proposal. Once that would be completed, the figures would be plugged in, just like net figures are inserted today, without any corresponding administrative inefficiency or increased complexity. Indeed, the only difference would be that the formula would project a more accurate rate than is currently the case, again without any corresponding administrative inefficiencies or increased complexities. The Commission should take this opportunity to gain greater accuracy without sacrificing administrative expediency in return and adopt its proposed gross book method for all ILECs.

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[14] Comments of NCTA at p. 25 (filed June 27, 1997).

[15] Communications Act Amendments of 1978, Public Law No. 95-234, codified at 47 U.S.C. § 224 ("Section 224").

[16] Comments of USTA at p. 8 (filed June 27, 1997). ARMIS Report 43-02 lays out in explicit detail the booked costs.

F. ILECs Have Not Artificially Inflated Disposal Costs As A Means Of Financing Other Ventures.

In its comments, NCTA attempts to paint the picture that the practice of adjusting amortization for anticipated costs of removal is an infrequent event permitted only in exigent circumstances.[17] To the contrary, it is the rule, rather than the exception, that future disposal costs are included when determining amortization figures. NCTA also makes the reckless charge that " [a]s utilities found it convenient to maximize cash flow to finance new ventures, their estimates of the costs of compliance with environmental and disposal rules soared."[18] Accepting this statement as valid denigrates the intelligence and competence of this Commission and the various State commissions involved in the process of setting depreciation prescription rates and overseeing the environmental and disposal costs of poles. Rejecting this statement acknowledges the truth; that the increase of disposal compliance costs are legitimate and result from the increased awareness by all parties involved of the impact that utility operations have on the environment.

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[17] Comments of NCTA at p. 21 (filed June 27, 1997).

[18] Comments of NCTA at pp. 21-22 (filed June 27, 1997). See also, Declaration of Patricia D. Kravtin, attached thereto, at p. 3, ¶ 9 ("Kravtin Declaration").

G. The Commission Should Adopt Its Proposed Part 32 Mapping Without Major Modification.

NCTA's comments go to great lengths to exclude nearly every Part 32 account identified by the Commission as being directly pertinent to determining pole attachment rates.[19] NCTA's arguments for excluding the accounts identified by Commission rest on two points: 1) the costs included in the accounts are not relevant; and, 2) the accounts identified cannot be traced directly back to previous Part 31 accounts.

Addressing the second point first, NCTA makes the statement that "there has not, and cannot, be one-to-one account mapping from Part 31 to Part 32.[20] Aside from this statement being wrong on its face, there is no statutory prohibition against the Commission's proposed mapping. Setting that aside for the moment, NCTA's statement does not support the logic it then employs to argue against the Commission's proposed mapping. For example, in the Kravtin Declaration, an argument is made against inclusion of Account 6110 in the pole attachment formula because the author is "unaware of any comparable account under Part 31 included in the pole formula in which included [sic] the extensive vehicle (including aircraft) and vehicle-related charges."[21] That is beside the point. The Part 31 system of accounts was replaced by the present Part 32 system. The statement that a particular Part 32 account should not be included in the pole attachment formula because it had no direct antecedent in Part 31 is an argument whose

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[19] Comments of NCTA at. pp. 26-38. See also, Kravtin Declaration at pp. 6-19, ¶¶ 16-48.

[20] Comments of NCTA at p. 26.

[21] Kravtin Declaration at p. 16, ¶ 39.

foundation rests on a set of Commission rules that have not existed since 1988.

With respect to the argument that the identified Part 32 accounts contain expenses unrelated to poles, USTA would reply by directing attention to the stated nature of the Plant Specific Operations Expense accounts, 6110 through 6441. The Commission states very clearly in its rules that the costs of these accounts include the costs of inspecting, testing, reporting, maintaining, replacing, rearranging, restoring, post-repair inspecting, training, and supervision.[22] The Kravtin Declaration generally refuses to acknowledge that there is a certain amount of general overhead caused by poles, and that the cost of this overhead does generate benefits for all attachers. Consequently, the accounts identified by the Commission are appropriately included in the various carrying charge components.

The Kravtin Declaration claims that because attachers are charged make-ready fees to cover engineering expenses when attachments are placed or modified, Account 6535 should not be included in the administrative carrying charge component.[23] Doing so, the author claims, would permit ILECs to double-charge.

To begin with, there is no double-charging, because the Commission's Uniform System of Accounts requires separate and distinct costs to be recorded in separate and distinct accounts. Non-recurring make-ready fees cover engineering costs that are separate and distinct from general engineering costs. The Commission's rules state that Account 6535 "shall include the costs

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[22] 47 C.F.R. § 32.5999(b)(3).

[23] Kravtin Declaration at pp. 14-15, ¶¶ 34-38.

incurred in the general engineering of the telecommunications plant which are not directly chargeable to an undertaking or project."[24] The Kravtin Declaration notwithstanding, there are in fact general engineering costs, separate and distinct from make-ready costs, incurred by ILECs in overseeing and maintaining the vast network of poles, the benefits of which accrue to all attachers.

The Kravtin Declaration also claims that because attachers are charged make-ready fees to cover network support and ride-out expenses when attachments are placed or modified, Account 6110 should similarly be excluded from the administrative carrying charge component.[25] Again, USTA would point out that no double-charge occurs and that ILECs do incur network support costs, apart from make-ready costs, that are to the general benefit of all attachers.[26]

With respect to the Kravtin Declaration's opposition to including Account 6120 in the administrative carrying charge component,[27] USTA would again note the Kravtin Declaration's general refusal to acknowledge the concept of general overhead associated with poles. Pole networks require maintenance and administration, which in turn requires personnel. Personnel require the use of buildings and the land on which the buildings sit. In order to function,

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[24] 47 C.F.R. § 32.6535(a).

[25] Kravtin Declaration at p. 16, ¶ 39.

[26] With respect to the Kravtin Declaration singling out Account 6113, unless one accepts the insinuation that ILECs maintain air fleets that rival the commercial airlines, the costs are *de minimis*. Furthermore, any aircraft costs that might be incurred would again be related to supporting and maintaining the pole network, particularly in remote or hard-to-reach areas.

[27] Kravtin Declaration at pp. 16-17, ¶¶ 40-41.

personnel also require furniture to sit on, office equipment to make copies, and computers to create documents. Personnel even require janitors to ensure that the buildings they work in are not shut down for health code violations. These are precisely the costs that are recovered in Account 6120, not Account 6720 as the Kravtin Declaration alleges.

USTA similarly rejects the argument made by the Kravtin Declaration that Account 6534 should be excluded.[28] Aside from being incorrect, it is irrelevant that the author alleges that there was no corresponding Part 31 account.[29] Again, comparing the costs covered by Account 6534 with those covered by Account 6720 and its subaccounts fails to disclose any overlap. All of the subaccounts in Account 6720 pertain to readily identifiable tasks, none of which address the costs of general administration of plant operations.

USTA would echo the sentiment similar to that stated by Time Warner that advocating a wholesale overhaul of the accounts to be considered when determining the various carrying charge components is ultimately an exercise in "he said, she said."[30] For every party advocating more cost exclusion, a party can be found showing that more cost inclusion is necessary. It may be that some modification of the proposed Part 32 mapping might be appropriate.[31] However,

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[28] Kravtin Declaration at p. 17, ¶ 42.

[29] Part 31 Accounts 706 and 709 addressed these costs. USTA would again note the irrelevancy of the Kravtin Declaration's reliance on Commission rules that have not existed in nearly a decade to bolster its assertions, which in themselves are incorrect.

[30] Comments of Time Warner at p. 3 (filed June 27, 1997).

[31] For instance, the Commission's proposed exclusion of pole rental expenses from Account 6411 merits reconsideration.

from its establishment, the pole attachment formula has operated on reasonable assumptions and averages. Indeed, one of Congress' original charges to the Commission was to balance administrative efficiency with accuracy.[32] Again, USTA would reiterate that the Commission's proposed Part 32 mapping is a "best estimate" that reasonably and appropriately identifies the costs associated with poles. Consequently, it should be adopted without major modification.

II. Pole and Conduit Spatial Issues

A. Pole Load Capacity Is Not The Proper Determinant For Levying Attachment Charges.

AEP *et al.*, advance the argument that attachers should be charged an additional attachment rate for each overlashed cable they place on a pole.[33] This argument is wrong and should be rejected by the Commission. The entire premise of the present pole attachment formula contained Section 224(d)(1) is based on the percentage of total usable space occupied by one attachment. The present formula is not based on the percentage of total pole load capacity taken up by an attachment. The suggestion to utilize pole load capacity as the underlying determinant for levying attachment charges is completely unsupported by the statute.

So long as an attacher does not exceed NESC requirements and other applicable safety

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[32] S. Rep. No. 95-580, 95th Cong., 1st Sess. (1977) ("1977 Senate Report") at p. 8. ("As to some of these factors, the Committee expects that the Commission will have to make its best estimate of some of the less readily identifiable actual capital costs.")

[33] Comments of American Electric Power Service Corporation, Commonwealth Edison Company, Duke Power Company, Florida Power and Light, and Northern States Power Company (AEP *et al.*) at pp. 72-73 (filed June 27, 1997).

and engineering codes in attaching to the pole, overlashed attachments installed by an entity to its own pre-existing attachment should be considered as "one" attachment.[34] Obviously, if an overlashed attachment were to violate the requisite safety requirements, it would need to be attached to the pole separately, in which case a separate attachment charge would be appropriate.

B. The Space Occupied By An Attaching Entity Is Not A "Free Zone" Which The Attacher May Use As It Sees Fit To Attach As Many, Or Any Manner Of, Attachments As It Wishes Without Being Subject To Additional Attachment Charges.

AT&T's notion that an attacher pays for the use of a given amount of vertical space on a pole, thereby allowing it to utilize that space as it sees fit without being subject to additional attachment charges is specious.[35] Such a viewpoint necessarily assumes that the attacher accrues ownership rights through attachment. If one accepts this argument, then in addition to cramming as many attachments as it can in the vertical space, an attacher should also be permitted to sublease the space to a third party without obtaining pole-owner consent. This viewpoint is

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[34] As a general rule, for safety reasons pole-owners usually prohibit third parties from overlashing onto pre-existing pole attachments. Permitting third parties to overlash pre-existing attachments without the knowledge and express consent of the pole-owner raises very real and significant safety concerns. Moreover, permitting overlashing by third parties onto pre-existing attachments would allow the third party overlasher to avoid paying its fair share of pole costs. Consequently, overlashed attachments should be counted as "one" only if all of the attachments, both the pre-existing attachment and subsequent overlashes, belong to the same attaching entity.

[35] Comments of AT&T at pp. 4-5 and 7-8 (filed June 27, 1997).

wrong, and the Commission has already rejected it.[36]

As a matter of legislative and regulatory consistency, the presumption since enactment of Section 224 has been that *each* attachment occupies one foot of usable space. The Commission's Notice affirms this continued usage by explicitly stating the one foot figure in Appendix A.[37] Furthermore, as has been stated time and again throughout the existence of Section 224, the formula used to resolve pole attachment complaints is based upon reasonable presumptions and averages. The one foot presumption used in the formula is a presumption used only to allocate the costs of owning and maintaining a pole. It is a cost allocation factor, *not a deed.* The Commission should affirm that each attachment is presumed to occupy one foot of usable space and that an attacher is not free to place as many attachments in its occupied space without being subject to additional attachment charges.

AT&T further states that the attacher should be permitted to place any sort of attachment within its occupied space.[38] The phrase "technically feasible" is not synonymous with "prudent engineering practices." Multiple attachment brackets present significant difficulties for pole owners when conducting routine pole maintenance or rearranging attachments. Moreover, the use of multiple attachment brackets places torsional strain on poles that were designed and placed

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[36] Interconnection Order, at ¶ 1216. ("The statute [Section 224] does not give that party [the attacher] any interest in the pole or conduit other than access.")

[37] Notice, Appendix A. ("space occupied by attachment = 1 foot")

[38] Comments of AT&T at pp. 7-8. ("[T]he Commission should clarify that pole owners may not prohibit or limit technically feasible multiple uses of pole space...") (filed June 27, 1997).

to endure perpendicular and vertical strains only. As such, multiple attachment brackets are generally utilized to address specific engineering concerns, such as eliminating pole corners and unnecessary anchor guys. AT&T's own pictures support this statement.[39] To the extent that brackets are used to correct engineering concerns and eliminate more costly engineering corrections, their use is to the benefit of all attaching parties. However, this does not mean that multiple attachment brackets should be placed in a haphazard fashion by any attacher wishing to avoid the costs of pole change outs in order to accommodate its own expanded capacity needs. Adopting AT&T's argument would place enormous stress on the entire pole network and place all aerial plant at risk of failure. The Commission should reject AT&T's argument and not adopt a blanket statement regarding permissible attachments. Such issues are uniquely different and should be resolved on a case-by-case basis, pursuant to the Commission's findings in the Interconnection Order.[40]

C. The Commission Should Forbear From Applying Its Pole Attachment Formula to Wireless Attachments.

The original intent of Congress in enacting Section 224 was its desire to provide a measure of protection to the cable television (CATV) industry against pole owners charging

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[39] Comments of AT&T, pictures 11 and 12 (filed June 27, 1997).

[40] Interconnection Order at ¶ 1143. ("We conclude that the reasonableness of particular conditions of access imposed by a utility should be resolved on a case-specific basis... The record makes clear that there are simply too many variable to permit any other approach with respect to access to the millions of utility poles and untold miles of conduit in the nation.") (footnote omitted). See also Interconnection Order at ¶ 1186.

unreasonable attachment rates.[41] When Section 224 was enacted, the vast majority of CATV was delivered through the wireline medium. This still holds true today. The options for attaching wire plant remain fairly limited. However, as EEI and UTC point out, the number of attachment medium options facing a wireless service provider are much more varied.[42]

USTA agrees with the observation made by EEI and UTC that there is no economic reason to apply the pole attachment formula to wireless attachments.[43] The pole attachment formula, which is designed to protect against the leveraging of a bottleneck facility, does not provide any relevant degree of protection for wireless attachments. The wide availability of alternative attachment mediums negates any leveraging power a pole owner might be perceived to possess. In effect, the pole attachment formula becomes irrelevant with respect to wireless attachments. Indeed, applying the pole attachment formula to wireless attachments has the perverse effect of dictating a regulatory rate that may bear no resemblance to the rates being freely negotiated in the marketplace. Accordingly, the Commission should forbear from applying its pole attachment formula when resolving complaints regarding wireless attachments, and instead allow the market to continue setting its own rates.

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[41] 1977 Senate Report at p. 3. ("...Federal involvement in pole attachment arrangements should serve two specific, interrelated purposes: to establish a mechanism whereby unfair pole attachment practices may come under review and sanction, and to minimize the effect of unjust or unreasonable pole attachment practices on the wider development of cable television service to the public.")

[42] Comments of Edison Electric Institute and UTC, The Telecommunications Association (EEI and UTC) at p. 7 (filed June 27, 1997).

[43] Comments of EEI and UTC, at p. 6 (filed June 27, 1997).

D. Opposition To The Commission's Proposed Half-Duct Occupancy Presumption Is Based Upon Present Conduit Construction Standards, But Ignores The Realities Surrounding Older Conduit That Is Already Occupied By Electrical and Communications Cable.

A number of commenting parties oppose the Commission's proposed half-duct occupancy presumption, arguing that modern ducting can be further subdivided into smaller ducts through the installation of inner-duct.[44] This observation is true only if the conduit is empty and inner-ducting is provided for at the time the conduit is installed. Once a duct is installed and a cable placed within it, installing inner-ducting at a later date becomes problematic. Retrofitting ducts with inner-ducting risks damaging the cables already in place and disrupting service.

The option of retrofitting ducts, difficult as it is for modern ducting, disappears when considering older ducts. A substantial amount of older ILEC ducts have diameters of between two and three-and-one-half inches. Even if these ducts were empty, they are still too small to accommodate inner-ducting. The amount of inner-ducting that a duct can accommodate depends upon the size of the duct itself. A two inch duct, even unoccupied, cannot accommodate four inner-ducts.

The Commission should affirm its proposed half-duct occupancy presumption because it is reasonable. The number of inner-ducts that a duct can accommodate depends on the size of the duct and whether it is presently occupied. The half-duct occupancy presumption reasonably averages those instances where a whole-duct occupancy presumption is proper with those where

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[44] Comments of Time Warner at p. 24; TCI at p. 16; NCTA at p. 42; MCI at p. 25; and, AT&T at p. 22 (all filed June 27, 1997).

a duct can accommodate three or four inner-ducts. The Commission should reject the other various duct occupancy presumptions proffered. The pole attachment complaint process relies on averages and reasonable presumptions, and the half duct occupancy presumption reasonably averages the occupancy capacity of ILECs' conduit systems.

As a final note, the Commission should reject the arguments put forth by the electric utilities that any duct occupied by telecommunications plant is unusable for electrical plant, thus the occupying telecommunications service provider should be charged for the entire duct.[45] Such an argument does not acknowledge the existence of inner-ducting. Even if the duct is not subdivided, occupancy by telecommunications cable does not mandate application of a full-duct occupancy charge. Occupancy by telecommunications cable does not preclude subsequent occupancy by other telecommunications service providers. Another telecommunications cable could be placed alongside the pre-existing telecommunications cable. Therefore, the half-duct occupancy presumption would be valid.

III. "Most Favored Nation" And Rate Publishing Requirements Are Not Within The Scope Of This Proceeding.

WorldCom suggests that the Commission require pole owners to publish the rates they charge attachers and offer "most favored nation" (MFN) treatment to attachers.[46] USTA suggests

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[45] Comments of AEP *et al.*, at p. 81; Con Edison at p. 6; Union Electric at p. 9; EEI and UTC at p. 20; and Electric Utilities Coalition at p. 64 (all filed June 27, 1997).

[46] Comments of WorldCom at p. 6-7 (filed June 27, 1997).